No. 20155

United States
Court of Appeals
for the Ninth Circuit

EDITH L. HIGLEY, Widow of
Darold B. Higley, Deceased,

Appellant,

v.

J .J. O'LEARY, Deputy Commissioner
Fourteenth Compensation District
W. J. JONES & SONS, INC., and
NATIONAL AUTOMOBILE &
CASUALTY INSURANCE CO.

Appellees.

Upon appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR APPELLEE J. J. O'LEARY DEPUTY COMMISSIONER

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COUNTERSTATEMENT OF THE CASE

In this action libelant below, appellant here, sought to have the District Court review and set aside as not in accordance with law a compensation order filed on August 13, 1964 by J. J. O'Leary, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. 901 *et seq.* In that order, the deputy commissioner rejected the compensation claim (death benefits) of libelant, Edith L. Higley (hereinafter referred to as "claimant"), on the ground that the death of Darold B. Higley (hereinafter referred to as "employee" or "deceased employee") was due to advanced coronary disease unrelated to the particular work in which he was engaged at the time of his death. The libel alleged, in effect, that the employee's death was attributable to the strain of his work. However, the court below, upon review of the record, concluded that there was substantial evidence to support the deputy commissioner's compensation order in which it had been found, in effect, that death was due to natural causes. Accordingly, the District Court sustained that order by granting the deputy commissioner's motion for summary judgment and denying claimant's motion for such judgment. This appeal followed.

THE COMPENSATION ORDER

The compensation order complained of reads in pertinent part as follows:

> Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following
>
> ### FINDINGS OF FACT
>
> That on the 16th day of December, 1963, the deceased above named was in the employ of the employer above named at Longview, Washington, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by National Automobile and Casualty Insurance Company; that on said date the deceased was performing service as a longshoreman for the employer and engaged in loading logs aboard the vessel, SS SAPHO, which was afloat in the Columbia River; that he reported for work at 8:00 A.M. on said date and together with other longshoremen had been engaged in moving timbers by means of a peavey and was so engaged at approximately 3:30 P.M. when he suddenly collapsed and died shortly thereafter; that for approximately nine months previous to said date the deceased had been employed as a longshoreman and the work in which he was engaged on the date of his death was similar to and no more strenuous than the type of work in which he was customarily engaged; that the immediate cause of death was an acute anterior myocardial infarction due to advanced atherosclerosis of the

coronary arteries and acute thrombosis of the left coronary artery; that the work in which the deceased had been engaged prior to his collapse and death did not contribute in any way to his death and the deceased did not sustain an accidental injury arising out of and in the course of his employment by the employer above named.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for death benefits filed by Edith L. Higley as surviving wife of the deceased be, and it is hereby REJECTED for the following reason: the death of the deceased was due to advanced coronary disease and was in no way related to the work in which he was engaged at the time of his collapse and death on December 16, 1963.

QUESTION PRESENTED

The only question presented is whether the record, considered as a whole, supports the deputy commissioner's finding that the death of the employee was caused by the employee's advanced heart disease and not by his activities as a longshoreman.

SUMMARY OF ARGUMENT

The evidence in the record before the deputy commissioner, considered as a whole, supports his finding that the employee's death was the product of natural causes unrelated to the employment activities of the deceased as a longshoreman. Thus supported, the finding is to be accepted upon judicial review. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504

(1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947).

In the light of the medical evidence of record showing that the stress of the deceased's longshore work on the day of death (which, in character, was similar to what he had been performing for nine months prior thereto) had *not* been the cause thereof, the deputy commissioner's finding to the effect that death was the product of the natural progression of the deceased's existing heart disease cannot be said to be "irrational." *O'Keeffe v. Smith, Hinchman & Grylls*, 380 U.S. 359 (1965). Autopsy and medical evidence — including that offered by claimant herself—showed that the employee had suffered coronary occlusions prior to the work that day and that, at the time of the latest occlusion, there was an 80 to 90 percent closure of the employee's arteries. This evidence showed that death had not been produced by the employee's longshore activities.

ARGUMENT

The deputy commissioner's finding that the employee's death was not employment related is supported by substantial evidence in the record considered as a whole.

(a) Scope of Review

The scope of judicial review in cases such as the one at bar is set forth in *O'Leary v. Brown-Pacific-*

Maxon, Inc., 340 U.S. 504 (1951), in which the Supreme Court said:

> . . . The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456. *It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole . . .*
>
> * * * *
>
> *. . . We do not mean that the evidence compelled this inference;* we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion . . . (Emphasis supplied.)

Similarly with reference to the inferences drawn by a deputy commissioner, the Supreme Court in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), said:

> In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. *But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference* that an injury did or did not arise out of and in the course of employment *is conclusive. No reviewing court can then set aside that inference because of a belief that the one chosen by the Deputy Commissioner is factually questionable.*
>
> *. . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The Dep-*

> *uty Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.* (Emphasis supplied.)

In short, where the deputy commissioner's compensation order has support of substantial record evidence it can be set aside only for an error of law, "such as a misconstruction of the Act." *Voris v. Eikel*, 346 U.S. 328 (1953).

And in language even more restrictive, the Supreme Court in *O'Keeffe v. Smith, Hinchman & Grylls*, *supra*, 380 U.S. 359 (1965) has added:

> The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner, are to be accepted unless they are *irrational* or "unsupported by substantial evidences on the record as a whole." . . .
>
> * * * *
>
> We agree that the District Court correctly affirmed the finding of the Deputy Commissioner. While this Court may not have reached the same conclusion as the Deputy Commissioner, it cannot be said that his *holding* . . . is *irrational or* without substantial evidence on the record as a whole. (Emphasis supplied.)

Under such interpretations of the Longshoremen's Act by the Supreme Court of the United States, as well as by this Court (*Morrison-Knudsen Company, Inc. v. O'Leary*, 288 F.2d 542 (1961), cert. denied 368 U.S. 817; *Western Boat Building Co. v. O'Leary*, 198 F.2d 409 (1952); *Crescent Wharf & Warehouse*

Co. v. Cyr. 200 F.2d 633 (1952)), a court may not set aside a compensation order unless, on the whole record, the court believes that the deputy commissioner was "compelled" to make findings, draw inferences and arrive at conclusions different from those set forth in the compensation order under review.

Accordingly, logical deductions and inferences which are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Crescent Wharf & Warehouse Company v. Cyr*, 200 F.2d 633 (C.A. 9, 1952); *Liberty Mutual Ins. Co. v. Gray*, 137 F.2d 926 (C.A. 9, 1943); *Contractors PNAB v. Pillsbury*, 150 F.2d 310 (C.A. 9, 1945); *Lowe v. Central Ry. Co. of N.J.*, 113 F.2d 413 (C.A. 3, 1940); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (C.A. 5, (1949). Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed. *C. F. Lytle Co. v. Whipple*, 156 F.2d 155 (C.A. 9, 1946); *Liberty Mutual Insurance Co. v. Gray*, 137 F.2d 926 (C.A. 9, 1943); *Lowe v. Central R. Co. of New Jersey*, 113 F.2d 413 (C.A. 3, 1940); *Contractors PNAB v. Pillsbury* 150 F.2d 310 (C.A. 9, 1945); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Henderson v. Pate Stevedoring Co.*,

Inc., 134 F.2d 440 (C.A. 5, 1943); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (C.A. 5, 1949); *Delta Stevedoring Co. v. Henderson*, 168 F.2d 872 (C.A. 5, 1948).

The deputy commissioner's findings of fact are presumed to be correct, *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964 (C.A. 5, 1944); *Anderson v. Hoage*, 63 App. D.C. 169, 70 F.2d 773 (1934); *Pan American Airways v. Willard*, 99 F.Supp. 257 (N.Y. 1951); they are to be accepted unless unsupported by substantial evidence in the record considered as a whole. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Voris v. Eikel*, 346 U.S. 328 (1953); *Crescent Wharf & Warehouse Co. v. Cyr*, 200 F.2d 633 (C.A. 9, 1952); *United States Fidelity & Guaranty Co. v. Britton*, 88 U.S. App. D.C. 293, 188 F.2d 674 (1951); *Walsh Stevedoring Co. v. Henderson*, 203 F.2d 501 (C.A. 5, 1953); *Gooding v. Willard*, 209 F.2d 913 (C.A. 2, 1954); *Charleston Shipyards v. Lawson*, 227 F.2d 110 (C.A. 4, 1955). The burden is on the plaintiff to show that the evidence before the deputy commissioner does not support the compensation order complained of in the review proceeding. *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (C.A. 5, 1949); *Gulf Oil Corporation v. McManigal*, 49 F.Supp. 75 (W.Va. 1943); *Eastern S.S. Lines v. Monahan*, 26 F.Supp. 944 (Me. 1939); cf. *National Lead Co. v. Kingsland*, 74 F.Supp. 985 (D.C. 1948).

It is important to note in connection with the instant case wherein compensation was denied that judicial review of a rejection of a claim involves a somewhat different viewing of the evidence from review of an award of compensation. In the latter case there must be affirmative evidence in the record to support the award. In the former, affirmative evidence is not needed to support the denial of compensation; for upon failure of a claimant to carry the burden of proof in support of his claim, the claim must be rejected notwithstanding the absence of affirmative evidence to disprove the claim. In other words, it is not necessary for the employer to prove a negative. *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954); *Kwasizur v. Cardillo,* 175 F.2d 235 (C.A. 3, 1949), cert. denied 338 U.S. 880. The rejection follows the claimant's failure to establish his claim. In the *Gooding* case, the Court of Appeals said:

> We might let decision turn on the above, but it should also be noted that *the burden to show that the accident was a contributing cause of the death was on the appellee.* It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, *the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged.* The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show affirm-

atively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision it was error to set it aside. (Emphasis supplied.)

(b) The Evidence

At the hearing before the deputy commissioner on June 3, 1964, evidence offered by claimant showed the employee, a forty-three-year-old longshoreman, had, in the year prior to his death, fainted (T. 6-7, 8)[1] and had, at some uncertain time before, experienced shortness of breath (T. 8). Further, that on the day of death, the employee was, with co-workers, engaged in handling timbers on rollers and peaveys aboard a vessel (T. 14-15); that when he collapsed he was "peaveying the timbers into place" with three other men (T. 16); and that the work in which the deceased employee was engaged when he collapsed consisted of "rolling timbers" (T. 21). Medical testimony offered by claimant showed, by autopsy, that the employee had suffered "an occlusion, a thrombosis, of his right coronary artery" some "*seven days or perhaps twenty-eight days*" *prior to his death,* and, more recently, an occlusion of the left coronary artery and infarction of the heart muscle which had been present some "four to *twelve* hours" before (T. 24, 27-28). [Work on

[1] T. refers to the transcript of the proceedings before the deputy commissioner.

the day in question started at 8:00 a.m. (T. 22), and the collapse had occurred between 3:00 and 4:00 p.m. (T. 14), also according to claimant's evidence.] Claimant's medical witness estimated from the autopsy that the employee's arteries already had an 80 to 90 percent closure from natural process of disease prior to the more recent occlusion (T. 28-29). Another medical witness, whom claimant called, recognized that the employee had a longstanding atherosclerotic condition which had persisted for years and was not produced by his work (T. 34). Further, he admitted that the presence of myocardial infarction or damage to heart muscle (as found by claimant's other medical witnesses, *supra*) indicated that the last occlusion had occurred *some time prior to death* (T. 36). [This admission reflected adversely upon the witness' earlier testimony that he could not agree with the testimony of claimant's other medical witness who had stated this occlusion had taken place some hours before, rather than at the time of death (T. 34).]

In support of the employer's position that the employee's death was not employment related (T. 5), DR. KENNETH CLARK WILHELMI testified, in part and in effect, as follows: That he specializes in internal medicine, which includes diseases of the heart and blood vessels, cardiology (T. 37-38); that he had examined the pathology report of Dr. Buck (Dr. Charles Edward Buck who had testified on behalf of claimant T. 23 *et seq.*, and whose autopsy

report was attached as Exhibit No. 1 to the deposition of Dr. Leonard B. Rose, referred to hereinafter); that he had heard the testimony offered by claimant (T. 38); that, in the witness' opinion, the cause of claimant's death was "a final ultimate occlusion in the anterior descending branch of the left coronary artery superimposed upon previous occlusive disease of the right coronary artery as well as partial previous occlusion of the anterior descending branch" (T. 40); *that the work being performed by the employee at the time of death was not related to the occurrence which caused death* (T. 40-41); that the finding of a myocardial infarction (as testified to by Dr. Buck (T. 24), and as stated in Dr. Buck's autopsy report) implies that a segment of the employee's heart muscle had undergone death prior to the death of the employee; that at least *several hours must elapse,* during which the patient continues to live, *before such changes will show in the heart muscle* (T. 41); *that if a person should die immediately as the result of an abrupt occlusion there would not be found the heart muscle changes described in the employee's case* (T. 41-42); that the cause of the occlusion in the employee's case was *"simply the end result of progression of atherosclerotic disease process* which [the employee] had, no doubt, for a number of years"; that such statement is based upon the witness' experience with such cases and knowledge of (medical) literature; that the pathologist's report (Exhibit No. 1 to deposition) verifies the fact of "extensive atherosclero-

tic disease in all of the [employee's] coronary arteries, the aorta as well" (T. 42); that the report noted infarcted changes in the area of the heart muscle supplied by the right coronary artery, as well as more acute changes due to the final occlusion of the anterior descending branch of the left coronary artery; that, in other words, there were pathological changes of both long and short duration collectively (T. 42-43); that the foregoing opinion does not overlook the finding in the autopsy report of a hemorrhage; that such a fact is one of the "very common findings in a coronary artery occlusion"; that the witness knows of no studies which conclusively prove "subintimal or intimal beating [to be] actually due to a change in blood pressure per se"; that, instead, the atherosclerotic process is such that the vessel wall becomes friable, fragments easily and bleeds easily, which he has always considered to be a progressive part of this disease (T. 43); that the witness would not say in all cases it is safe to limit severely the activity of a man whose heart is bad but, instead, the advice has to be "individualized for each case" (T. 45); that he cannot say the employee, had he not worked the previous two weeks, would probably have survived the day of death, inasmuch as *there is "no evidence that implicates effort in the production of a coronary artery occlusion"; that it was "the natural progress of [the employee's] disease that caused the ultimate occlusion in the left coronary artery"* (T. 47); that how soon a person dies (from an occlusion) "depends upon the

point where the conductive mechanism of the heart is interfered with to the point where the heart no longer beats"; that "death is always sudden" (T. 48); *that the witness was unable to state that the employee's death was connected with his activities of pushing on timbers with a peavey*; that the witness believes that if the employee had stayed home in an oxygen tent all day on December 16, 1963, he nevertheless would have died in the same hour of the same day (T. 49); that the witness was of the opinion that *any increase in heart rate and blood pressure had nothing to do with the occlusion which caused the employee's death* (T. 50); that studies in cases of myocardial infarctions and deaths therefrom as a result of coronary artery occlusions show that "these things occur any time, anywhere, any place, and if a man works eight hours a day he has one-third chance of sustaining [such a happening] during those eight hours" (T. 50-51); that most of them actually occur while the persons are at complete rest or asleep (T. 50-51).

There was also received in evidence at the hearing before the deputy commissioner a July 17, 1964 deposition of Dr. Leonard B. Rose on behalf of the employer. The report of autopsy was attached to that deposition as an exhibit therein. However, although the deputy commissioner's motion for summary judgment had expressly recited that the deposition along with the transcript of the proceedings before the deputy

commissioner was attached to the motion, through inadvertence the deposition and its exhibit (which consitituted part of the record before the deputy commissioner) were omitted. By stipulation filed in this appeal it has been stated by counsel for the parties that the deposition (and necessarily its exhibit) is "cumulative." This thus corroborates the foregoing evidence that the employee had died as the result of his existing severe and advanced obstructive coronary disease, and not as the result of his work activities in rolling timber.

Based on the foregoing evidence, the deputy commissioner concluded that the employee's death was without relationship to his employment activities.

(c) Discussion

The deputy commissioner's task in the instant case was to decide from the record whether the employee's myocardial infarction and death therefrom were, as claimed, causally related to the work he was doing at the time of his collapse. It was for the deputy commissioner, as trier of the facts, to resolve conflicting evidence on this issue.

It should be noted, contrary to claimant's assertion on this appeal, that there was no rejection of the present claim by the deputy commissioner predicated upon any principle that strain —— even the non-extraordinary strain of a worker's usual activities — may not

be a basis for entitlement to compensation in a proper case. In short, the order here under review is *not based upon an absence of stress or strain,* ordinary or extraordinary. Instead it is based upon the existence of affirmative medical evidence showing that there was no relationship between the employee's death and his longshore activities on the day in question — activities which the deputy commissioner described in terms of strain to be of the same degree as deceased's work of the past nine months. This medical evidence, including testimony offered by claimant herself which the deputy commissioner, as trier of the facts, accepted, indicated that death was due to antecedent coronary occlusions unrelated to any work strain. Claimant has misconstrued and misapplied the findings of the deputy commissioner, and has sought to convert the compensation order into one holding that ordinary work strain may not be *a* basis for an award. Instead, the order merely finds that such strain was not the cause of death in this case. And the affirmative medical evidence supports this finding. Even claimant concedes in substance that if her construction were to fail, "it would be difficult to assert that the Deputy Commissioner's rejection order is wholly without support in the record." (Appellant's brief, pages 9-10.)

In determining the relationship of the employee's death to his work or, instead, to natural causes having no connection with his employment efforts, it was solely within the province of the deputy commissioner,

as trier of the facts, to pass upon the credibility of witnesses; he could disbelieve any part or all of the evidence presented according to his judgment of its truthfulness and reliability: *Kwasizur v. Cardillo,* 175 F.2d 235 (C.A. 3, 1949), cert. denied 338 U.S. 880; *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954); *Wilson & Co. v. Locke,* 50 F.2d 81 (C.A. 2, 1931); *Hudnell v. O'Hearne,* 99 F.Supp. 954 (Md. 1951); *John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (C.A. 2, 1961); *Associated General Contractors v. Cardillo,* 70 App. D.C. 303, 106 F.2d 237 (1939). The rule as to acceptance upon judicial review of the deputy commissioner's evaluation of the credibility of witnesses applies also to medical witnesses: *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (C.A. 5, 1962); *John W. McGrath Corp. v. Hughes, supra,* 289 F.2d 403 (C.A. 2, 1961); *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954).

With respect to any conflict in the medical testimony offered by the parties, a deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner: *Hampton Roads Stevedoring Corp. v. O'Hearne,* 184 F.2d 76 (C.A. 4, 1958); *Baltimore & O. R. Co. v. Clark,* 56 F.2d 212 (Md. 1932); *Jarka Corporation of Philadelphia v. Norton,* 56 F.2d 287 (E.D. Pa. 1930); *Liberty Stevedoring Co. v. Cardillo,* 18 F.Supp. 729 (N.Y. 1937); *Zurich General Accident & Liability Ins. Co., Ltd. v. Marshall,* 42 F.2d 1010 (Wash. 1930); *Ryan Stevedoring Co.*

v. Norton, 50 F.Supp. 221 (Pa. 1943); *Liberty Mutual Ins. Co. v. Marshall,* 57 F.Supp. 177 (Wash. 1944), aff'd 151 F.2d 1007 (C.A. 9, 1945); *Contractors PNAB v. Pillsbury,* 150 F.2d 310 (C.A. 9, 1945); *Crescent Wharf & Warehouse Co. v. Cyr,* 200 F.2d 633 (C.A. 9, 1952); *Marine Operators v. Barnhouse,* 61 F.Supp. 572 (Ill. 1944).

Nor is the deputy commissioner bound to accept the testimony of a claimant even when that testimony is uncontradicted. Thus, in *Kwasizur v. Cardillo,* 175 F.2d 235 (C.A. 3, 1949), cert. denied 338 U.S. 880, the court stated:

> . . . As for Kwasizur himself, it could hardly be claimed that the Deputy Commissioner was bound to accept the truth of the story, even though it were not contradicted, if it seemed to him, as the trier of facts, an improbable one. We think, therefore, if no further testimony had been presented except that offered on behalf of the claimant, the finding against him could not be disturbed by a court.

As we have heretofore seen (under subtopic (a) of this "Argument"), rejection of a claim involves a different viewing of a case from one where a claim has been allowed. Unlike the latter type situation which requires the existence of affirmative evidence, the rejection requires none to support its denial which is warranted if a claimant has, in the opinion of the trier of the facts, failed to carry his burden of proof. *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954);

Kwasizur v. Cardillo, 175 F.2d 235 (C.A. 3, 1949), cert. denied 338 U.S. 880.

The record here contained ample evidence indicating that the myocardial infarction which resulted in the death of the employee was not causally related to his work activities. One of the employee's co-workers, called as a witness by claimant, testified that the employee had not complained of any pain or any unusual condition in the course of the day (T. 15), while another, similarly called by claimant, testified he had not noticed anything unusual about the employee and that "it was a half-way decent day and everyone seemed to be happy" (T. 20).

Moreover, the medical testimony offered by claimant was far from satisfactory in relating the period of the occlusion —— which caused the infarct — to a point in time when the employee was engaged in work for his employer. Indeed, in a way intended to represent accusation of the employer's counsel but actually reflecting adversely instead upon claimant, herself, the claimant significantly observes that Dr. Buck — *whom claimant had called as medical expert* — "was not asked to express an opinion as to whether or not the death was work-related." (Appellant's brief, page 4.) The medical evidence presented by the employer clearly refuted claimant's contention of relationship of death to work, accounting perhaps for claimant's failure to ask her own witness for an opinion on this all-important issue.

Certainly, it cannot be said that the deputy commissioner, as trier of the facts, was unwarranted in concluding from the existing record that claimant had not sustained the burden resting upon her to establish her claim. Nor can it be said that the evidence of record before the deputy commissioner "compelled" a finding that the employee's death was employment related within the meaning of the Longshoremen's Act. *O'Leary v. Brown-Pacific-Maxon, Inc. supra,* 340 U.S. 504 (1951), or that the deputy commissioner's finding was "irrational." *O'Keeffe v. Smith, Hinchman & Grylls, supra,* 380 U.S. 359 (1965).

Claimant has not only misconstrued the deputy commissioner's findings, as we have seen, but is laboring under a false impression that the filing of a claim raises, *per se,* a presumption of compensability. Thus, at page 12 of her brief it is stated that "[t]he applicable law which [the deputy commissioner] administers *presumes the claim to be compensable* 'in the absence of substantial evidence to the contrary.' " Reliance is placed upon Section 20(a) of the Longshoreman's Act, 33 U.S.C. 920(a).

First of all, were the contention valid, its efficacy was lost by the introduction of substantial evidence showing that death was the product of an antecedent coronary cause, unrelated (as claimed) to work activities. *Del Vecchio v. Bowers,* 296 U.S. 280, 285-287 (1935). With the introduction of evidence showing

that death was due to causes unconnected with the deceased's employment activities, "the presumption falls out of the case." *Ibid,* p. 286.

Secondly, although the section referred to raises a presumption that "the claim comes within the provisions of this Act" absent substantial evidence to the contrary, this provision relative to *coverage* (see Section 3(a), 33 U.S.C. 903(a), for the Act's coverage inclusions) does not create a presumption of *compensability,* as claimant asserts. In cases such as the present one there is no presumption of compensability arising from either the mere occurrence of an injury or the mere showing of disability or death, without more. It is essential for claimant to do more than present an application for payment. He must, instead, show to the satisfaction of the trier of the facts that disability or death, or both, are causally related to the injury. The presumption of Section 20(a) of the Longshoremen's Act, 33 U.S.C. 920(a), that a "claim" comes within the Act (upon which claimant here relies) requires some showing of the existence of facts supportive of a claim for compensation. There is no presumption in favor of compensability. *Hines v. Pacific Mills,* 214 S.C. 125, 51 S.E.2d 383 (1940). A claimant must still establish his claim of compensability. It is still the law that the burden is on him to prove the facts entitling him to an award of compensation, and this burden does not shift.

Numerous cases to this effect are cited under Key

Nos. 1339 and 1362, "Workmen's Compensation," American Digest System. A large number of the decisions on this point have gone to the extent of spelling out or specifying in detail the obligation on the part of claimants. In *Central E. & C. Co. v. Rossano,* 75 R. I. 108, 64 A.2d 197 (1949), it was stated that the mere showing of inability to work is insufficient to support a claim for compensation. Many of these decisions state in various ways that an award of compensation may not be made on the basis of conjecture or speculation and that the claimant must prove all factors or elements to a compensable claim: *Robertson v. North American Refractories,* 169 Md. 187, 181 A.223 (1935); *Conquy v. New Jersey P. & L. Co.,* 23 N.J. Super. 325, 93 A.2d 23 (1953); *Houle v. Tondreaux Bros. Co.,* (no State citation available) 91 A.2d 481 (Me. 1953); *Weirton Coal Co. v. Mishawake R. & W. Co.,* 119 Ind. 309, 84 N.E.2d 897 (1949); *Broughton v. South Carolina G. & F. Dept.,* 219 S.C. 50, 64 S.E. 152 (1951); *Roberts v. M.S. Carrol Co.,* 68 So.2d 689 (La. App. 1953); *Wiltze v. Borden's Farm Products Co.,* 328 Mich. 257, 43 N.W.2d 842 (1951).

Two Wisconsin cases phrase the standard of proof required of a claimant in terms of dispelling any "legitimate doubt" in the mind of the compensation agency: *Dentrice v. Ind. Comm.,* 254 Wis. 159, 35 N.W.2d 218 (1949); *Skelly v. Ind. Comm.,* 254 Wis. 315, 36 N.W.2d 58 (1949). And in *Lopez v. Kennecott*

Copper Corp., 71 Ariz. 212, 225 P.2d 702 (1950), the court said that the claimant must show affirmatively that he is entitled to compensation, that the commission is not required to disprove claimant's contention, and that if reasonable men could reach different conclusions from the evidence the decision of the commission has the same force as the verdict of a jury. For other cases adhering to this principle, see: *Rogers v. Williams,* 196 Va. 39, 82 S.E.2d 601 (1954); *Anderson v. Cowger,* 158 Neb. 772, 65 N.W.2d 51 (1954); *Reeves Motor Co. v. Reeves,* 204 Md. 576, 105 A.2d 236 (1954); *McCaleb v. Greer,* 267 S.W.2d 54 (Mo. App. 1954); *Rick v. Ind. Comm.,* 266 Wis. 460, 63 N.W.2d 712 (1954).

Disability or death from some potentially fatal disease which is the result of the progression of natural causes unrelated to some industrial mishap (as was here testified to with reference to the deceased) is not compensable. It has even been said that there is a presumption that a diseased condition which has been shown to exist is idiopathic as to both origin and development. *Macko v. Raritan Valley Farms,* 131 N.J.L. 283, 35 A.2d 872 (1944). Also see, *Black v. Mahoney Troast Const. Co.,* 168 A.2d 62 (N.J. Super. 1962).

Whether such a presumption of this kind may or may not be said to exist under the Longshoremen's Act is immaterial to decision here. What is important

is that the burden to establish industrial compensability is on claimants, and this the present claimant has failed to do to the satisfaction of the deputy commissioner.

CONCLUSION

In view of the above it appears that the deputy commissioner's finding that the employee's death was due to his antecedent coronary disease and unrelated to his work activities is supported by the record, and under the authorities cited herein should be accepted upon judicial review. The judgment of the court below sustaining the order was proper and should be affirmed.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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